UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, et al., Plaintiffs, v. Tyson Foods, Inc., et al. Defendants.	05-CV-0329 GKF-SAJ **THE CARGILL DEFENDANTS' SEPARATE RESPONSE TO PLAINTIFFS' MOTION TO EXPAND THE DISCOVERY PERIOD**

Defendants Cargill, Inc. and Cargill Turkey Production, LLC (together, the "Cargill Defendants") oppose Plaintiffs' Motion to Expand the Discovery Period (Dkt. No. 1418) and urge the Court to maintain its fair and workable five-year default discovery guideline.

INTRODUCTION

When Plaintiffs served discovery on all Defendants in the fall of 2006, most requests lacked any limitation as to time and all requests lacked any reasonable limitation. Different Defendants reacted to these requests differently. The Cargill Defendants, in an attempt to balance burden against probative value, produced (1) all responsive documents from 2002 forward and (2) with respect to certain categories of highly relevant documents, all documents without regard to date. (For example, the Cargill Defendants produced all IRW contract grower files in their possession, regardless of date.[1])

The Cargill Defendants also recognized the possibility that additional categories of pre-2002 information might be the appropriate subject of discovery in this litigation. Hence, the

[1] These IRW grower files included for all growers who were active in 2002 or later years: a) the Cargill Defendants' contracts with the growers, b) amendments to those contracts, c) chemical identification hazard communications, d) communications with the growers regarding turkey placement, and e) communications regarding grower payment.

Cargill Defendants asked Plaintiffs to identify particular discovery requests for which Plaintiffs believed a longer temporal scope might be justified. (D. Mann. Apr. 26, 2007 Aff. ¶ 8: Dkt. No. 1136.) Instead of responding to that overture, however, Plaintiffs moved to compel in April 2007 asserting that there should be no limit on the temporal scope of any discovery in this case. (Dkt. No. 1120.)

On July 7, 2007, this Court denied the temporal aspect of Plaintiffs' motion except as to "documents relevant to the corporate knowledge of [Defendants] of detriment to the environment from the application of poultry waste to the ground," stressing that the Court was otherwise "not able to determine the validity of Plaintiff's position without extensive briefing on the legal issues presented and expert testimony on the impact of chicken waste application in the distant past upon the current condition of the watershed." (Order at 3, 2: Dkt. No. 1207.) The Court then stated, "[e]ven if the court should determine that such evidence is relevant, additional testimony would be needed to determine whether the costs of producing such documents outweighs their probative value." (Id. at 2.) Accordingly, "in the interest of avoiding such additional briefing and testimony," the Court directed all of the parties to meet and confer "to resolve all remaining issues" presented by Plaintiffs' motion to compel. (Id. at 3.) The Court also ordered the parties to notify it of unresolved issues to be set down for briefing or testimony should the meet and confers fail. (Id.)

As directed, the Cargill Defendants produced without regard to date documents and ESI relevant to their corporate knowledge of effects on the environment from the land-application of poultry litter. The Cargill Defendants also continued to meet and confer with Plaintiffs on the scope of remaining discovery. (See, e.g., Ex. 2: July 10, 2007 Ltr. from R. Nance to T. Hill; Ex.

3: Aug. 2, 2007 Ltr. from T. Hill to R. Nance & T. Hammons.) Prior to the meet and confer, the Cargill Defendants provided a detailed index of their produced documents to Plaintiffs so that Plaintiffs knew exactly what types of documents the Cargill Defendants had available. (Ex. 4: June 5, 2007 Ltr. from D. Mann to R. Garren.) During these discussions, Cargill again provided Plaintiffs with a categorical identification of the types of pre-2002 documents available. After considering the available categories of documents, Plaintiffs identified areas where they sought pre-2002 materials and provided reasons for each request. The Cargill Defendants carefully considered the requests and rationales, and agreed to every one of Plaintiffs' more specific requests for older documents and information. Specifically, in addition to the post-2002 IRW contract grower files, the Cargill Defendants offered to produce complete contract grower files for all historical contract turkey growers in the IRW, pre-2002 flock evaluation reports for all IRW contract turkey growers, pre-2002 environmental audits for all IRW contract turkey growers, and (to the extent applicable) all such documents relating to IRW turkey breeder farms. (See Ex. 1: D. Mann Aff. ¶¶ 3, 7; Ex. 3: Ltr. at 1-2.) The Cargill Defendants made this offer of production in a letter that also asked Plaintiffs to identify any additional categories of documents for which Plaintiffs sought pre-2002 discovery. (Ex. 3: Ltr. at 5.)

Plaintiffs did not respond to the letter, did not object to the scope of the Cargill Defendant's proposed further production, and did not request any additional documents in any additional categories. (Ex. 1: D. Mann Aff. ¶¶ 4-5.) As a result, the Cargill Defendants produced the documents as Plaintiffs had requested and understood the temporal issue to be entirely resolved as between the Cargill Defendants and Plaintiffs. (Id. ¶¶ 4-5, 7.) The Cargill Defendants have since remarked that this exchange between Plaintiffs' attorneys and the Cargill

Defendants' attorneys represents one of the most successful meet-and-confer efforts in the long course of this undeniably contentious litigation. (See Dec. 28, 2007 Ltr. from B. Jones to R. Garren: Dkt. No. 1443-2.)

Not until the business day before Christmas did the Cargill Defendants become aware that Plaintiffs wanted to undo the compromise reached on July 19, 2007. (Id.; Ex. 1 ¶ 5; see also Dkt. No. 1418.) In response to the Motion to Expand the Scope of Discovery filed against all Defendants, the Cargill Defendants first contacted Plaintiffs to remind them that – at least as to the Cargill Defendants – the parties had months before met and conferred and agreed to the limited supplemental production of pre-2002 materials that had already taken place.[2] (Ltr. at Dkt. No. 1443-2.) Because of that compromise, and because Plaintiffs had not even attempted to meet and confer with the Cargill Defendants regarding the instant motion, the Cargill Defendants requested that Plaintiffs withdraw the motion as to the Cargill Defendants. (Id.)

In response, Plaintiffs refused even to acknowledge the parties' agreement, let alone to withdraw the motion. (Jan. 3, 2008 Ltr. from B. Nance to B. Jones: Dkt. No. 1443-3.) There has been no further communication between the Cargill Defendants and Plaintiffs on this issue; Plaintiffs have not stated what categories of documents or for what additional specific discovery requests they seek pre-2002 information from the Cargill Defendants. (See id.)

[2] Meanwhile, Defendants jointly moved to stay the briefing schedule on Plaintiffs' temporal scope motion until after concluding the hearing on Plaintiffs' pending motion for preliminary injunction. (Dkt. No. 1438.) The Court granted that motion and set a response deadline of March 10, 2008. (Order of Feb. 1, 2008 at 2: Dkt. No. 1502.) However, due to the necessary postponement of the preliminary injunction hearing, Defendants requested a further extension of the response deadline (Dkt. No. 1615), which was granted (Dkt. No. 1623).

DISCUSSION

The inevitable conflict between Federal Rule of Civil Procedure 1's mandate that courts construe the Rules to "secure the just, speedy and inexpensive determination of every action" and Rule 26's broad treatment of discoverable information is inevitably resolved by Magistrate Judges who fashion just balances between opposing parties' interests. Hence, the advisory committee note to Rule 26(b)(1) recognizes a Court's discretion to tailor the limits of discovery in a given case. Particularly in the event of "sweeping or contentious discovery" – like that in this litigation – the Court should regulate the breadth of discovery. See Fed. R. Civ. P. 26(b)(1) advisory committee note (2000). As a result, many courts have found that discovery requests not limited to any reasonable time are facially overbroad. E.g., Moss v. Blue Cross & Blue Shield of Kan., Inc., 241 F.R.D. 683, 690 (D. Kan. 2007) (finding requests overbroad and upholding defendants' suggested discovery limitation of five years where requests contained no time limit); Williams v. Sprint/United Mgmt. Co., 2006 U.S. Dist. LEXIS 69051, at *23 (D. Kan. Sept. 25, 2006) (finding requests overbroad and upholding defendants' suggested discovery limitation of 18 months where requests contained no time limit) (at Dkt. No. 1136 Ex. 3.).

A. The Court's Initial Ruling and the Parties' Compromises Established a Sound and Balance Scope for Discovery.

As detailed in the Cargill Defendants' original response to Plaintiffs' request to enforce an unlimited time frame of discovery, both parties had objected to discovery requests seeking historical information as being unduly burdensome. (Dkt. No. 1136-1 at 8-9.) When Plaintiffs moved to compel on this point, the Cargill Defendants asked this Court to balance the likelihood of discovering useful historic information against the significant burden imposed by discovery not limited in time. (See Dkt. No. 1136-1.) Ultimately, the Court exercised its discretion and

imposed a default five-year, pre-2002 limitation on discovery not related to corporate knowledge of detriment to the environment from the land-application of poultry litter. (Dkt. No. 1207 at 2-3.)

As to documents outside this realm of corporate knowledge, the Court emphasized that it was "not able to determine the validity of Plaintiff's position without extensive briefing on the legal issues presented and expert testimony on the impact of chicken waste application in the distant past upon the current condition of the watershed. Even if the court should determine that such evidence is relevant, additional testimony would be needed to determine whether the costs of producing such documents outweighs their probative value." (Id. at 2.)

The Court's five-year default limitation on historical discovery unrelated to corporate knowledge of environmental hazards struck a workable balance between burden and probative value. Consistent with the Court's direction, the Cargill Defendants have willingly expanded the scope of discovery to earlier dates where Plaintiffs provided sound reasons why the older information was needed. Although this system of default and compromise has worked, the additional discovery sought by Plaintiffs has nonetheless imposed substantial costs on the Cargill Defendants. The Cargill Defendants have spent massive resources of time, personnel, and money in limiting discovery to various time frames. (Ex. 1: D. Mann. Aff. ¶¶ 6-7, 9-11.) To undo that compromise now – after the Cargill Defendants have completed substantially all of their supplemental pre-2002 productions and Plaintiffs have enjoyed the benefit of this resolution – would be fundamentally unfair.[3]

[3] The Cargill Defendants' only document production remaining under the Court's current orders regarding geographical and temporal scope of discovery pertains to approximately 200 boxes located in its storage facilities. These 200 boxes are the portion of the storage documents (a total of 2,000 boxes) believed to contain documents relevant to corporate knowledge and/or the limited categories discussed during the parties' July 19, 2007 meet and confer. The Cargill

B. Plaintiffs' Shannon Phillips Affidavit Does Not Justify Broadening Discovery.

In an apparent attempt to partially address the Court's comments, Plaintiffs offer in support of their new motion, the affidavit of Shannon J. Phillips as purported expert evidence that phosphorus released more than five years ago caused harm more than five years ago. (Dkt. Nos. 1418, 1418-2.) That affidavit, however, does not justify Plaintiffs' request that this Court broadly expand the scope of discovery to reach all time periods. Among other problems, Plaintiffs have not provided the Court or Defendants with any of the data that supposedly underlies Ms. Phillips' cursory conclusions. Further, Ms. Phillips is a zoologist; she holds no degree in hydrology, geology, environmental science, microbiology, or anything else that would potentially make her qualified to opine on "the impact of chicken waste application in the distant past upon the current condition of the watershed," as this Court ordered. (Order of July 7, 2007 at 2: Dkt. No. 1207.) The affidavit also cites numerous non-poultry litter sources that have potentially impacted phosphorus levels in the IRW, including commercial fertilizer, cattle production and pasturing, wastewater treatment plants, road building, construction, and soil tillage. (Dkt. No. 1418 at ¶¶ 3, 6, 7, 10, 11 [marked as 9], 12 [marked as 10].)

In short, the twelve unsupported paragraphs offered by Ms. Phillips do not satisfy the Court's request for "expert testimony on the impact of chicken waste application in the distant past upon the current condition of the watershed." (Dkt. No. 1297 at 2.) "Even if the court should determine that such evidence is relevant," Ms. Phillips's affidavit does not even purport to be the "additional testimony ... needed to determine whether the costs of producing such

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Defendants placed the review and production of these 200 boxes on hold pending resolution of this motion. (Ex. 1: D. Mann Aff. ¶ 8.)

documents outweighs their probative value." (Id.) Nor does Plaintiffs' four-page motion satisfy this Court's request for "extensive briefing on the legal issues presented." (Id.)

C. Altering the Scope of Discovery Now Would Substantially and Unfairly Burden the Cargill Defendants.

The additional burden that altering the scope of discovery would impose on the Cargill Defendants far outweighs any arguable probative value of the information sought in Plaintiffs' motion. The first time this issue was before the Court, the Cargill Defendants submitted an Affidavit of Ms. Dara Mann detailing the burdens of expense and time that would be imposed by temporally limitless discovery. (Dkt. No. 1136.) The Cargill Defendants have updated that information in a new Affidavit that provides the Court with the actual costs the Cargill Defendants incurred in complying with (1) the Court's original discovery order (Docket 1207) and (2) the compromises reached in the July 2007 meet-and-confer session. (Ex. 1: D. Mann. Aff. ¶¶ 6-7, 9-11.) The Cargill Defendants expended these efforts and incurred these costs last Fall on the understanding that their efforts would satisfy Plaintiffs' discovery requests in all the areas for which Plaintiffs had identified the need to go further back than five years. Further, Plaintiffs' counsel has acknowledged that the Cargill Defendants' "volume of document production ... is greater than the combined total of all other defendants." (Ex. 5 at 1: Mar. 21, 2008 Email from R. Garren to J. Tucker.)

The accompanying affidavit also details the new and substantial burden that the Cargill Defendants would have to bear to broaden the temporal scope of their discovery at this point. Such an expansion would require the Cargill Defendants to spend more than an estimated additional $2.4 million to return again to these same sources and repeat their same efforts, this time to identify, collect, review, redact, and produce the remaining pre-2002 responsive

materials. (Ex. 1: D. Mann. Aff. ¶ 11.) Among other things, this renewed effort would require the collection, review, and production of additional ESI, an effort that took the Cargill Defendants months to complete for the corporate knowledge issue and agreed pre-2002 document categories alone. (Id. ¶ 6, 7, 9, 10.) Additionally, the Cargill Defendants would have to collect and review documents in their operations and storage facilities for material responsive to the each of the 250-plus document requests that have been served by Plaintiffs during the course of this litigation.

All Plaintiffs would have needed to do to avoid this motion – and more importantly to avoid the prospect of imposing on the Cargill Defendants yet another time-consuming and expensive document production – was to identify when asked the categories of pre-2002 Cargill documents they seek. Plaintiffs could and should have provided this information during the July 19, 2007 meet and confer, or at the very least when specifically asked by the Cargill Defendants before the major document review last fall. (See Ex. 3.) If Plaintiffs felt issues remained following the July 2007 meet and confer, they could have timely presented this issue for the Court's consideration rather than waiting more than six months to file their motion. (See July 7, 2007 Order at 3: Dkt. No. 1207.)

D. The Older Documents at Issue Offer Minimal Probative Value.

On the other side of the scale, the pre-2002 information the Cargill Defendants could provide would be of exceedingly low practical value to Plaintiffs. (D. Mann. Aff. ¶ 12.) The Cargill Defendants' remaining pre-2002 documents include such mundane materials as form documents related to the routine production of feed (e.g., job tickets, production run reports,

mixing forms). (Id.) Indeed, certain Plaintiffs' counsel have described these very same documents as "trash" after receiving them for the post-2002 time frame. (Id.)

The fact alone that the remaining pre-2002 information is of such low probative value is sufficient to deny Plaintiffs' motion. However, when coupled with the reality that production of all pre-2002 information would result in massive expense and burden to the Cargill Defendants, the low probative value of the remaining information balanced against the cost of production becomes dispositive of this motion. Because the Cargill Defendants have shown that "the costs of producing such documents outweighs their probative value" (see Order of July 7, 2007 at 2), the Court should deny Plaintiffs' motion.

CONCLUSION

The 2002 guideline imposed by this Court is a fair and workable default discovery cut-off for this action. Despite the picture painted by Plaintiffs' motion, when the parties have tried to work together to identify reasonable exceptions to the five-year scope, they have largely succeeded in doing so. As a result, the Cargill Defendants have already produced many categories of documents and ESI from all available dates, not just since 2002. Plaintiffs fail to provide sufficient reason or expert support to remove this default time limitation at this late date in the litigation. At least as to the Cargill Defendants, the cost of producing these materials far outweighs their minimal probative value. Accordingly, the Court should deny Plaintiffs' Motion to Expand the Discovery Period and should instead maintain the status quo under which the parties have operated throughout the discovery period.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 21st day of March, 2008, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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